

employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g) or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and

trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

(d) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

#### PREFILING PROCEDURES

##### § 655.120 Offered wage rate.

(a) To comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.

(b) If the prevailing hourly wage rate or piece rate is adjusted during a work contract, and is higher than the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time the work is performed, the employer must pay that higher prevailing wage or piece rate, upon notice to the employer by the Department.

(c) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the AEWRs for each State as a notice in the FEDERAL REGISTER.

##### § 655.121 Job orders.

(a) *Area of intended employment.* (1) Prior to filing an *Application for Temporary Employment Certification*, the employer must submit a job order, Form ETA-790, to the SWA serving the area

of intended employment for intrastate clearance, identifying it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H-2A workers. The employer must submit this job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites.

(2) Where the job order is being placed in connection with a future master application to be filed by an association of agricultural employers as a joint employer, the association may submit a single job order to be placed in the name of the association on behalf of all employers that will be duly named on the *Application for Temporary Employment Certification*.

(3) The job order submitted to the SWA must satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F and the requirements set forth in § 655.122.

(b) *SWA review.* (1) The SWA will review the contents of the job order for compliance with the requirements specified in 20 CFR part 653, subpart F and this subpart, and will work with the employer to address any noted deficiencies. The SWA must notify the employer in writing of any deficiencies in its job order no later than 7 calendar days after it has been submitted. The SWA notification will direct the employer to respond to the noted deficiencies. The employer must respond to the deficiencies noted by the SWA within 5 calendar days after receipt of the SWA notification. The SWA must respond to the employer's response within 3 calendar days.

(2) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer may file an *Application for Temporary Employment Certification* pursuant to the emergency filing procedures contained in § 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the

event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted above. If upon review of the *Application for Temporary Employment Certification* and the job order and all other relevant information, the CO concludes that the job order is acceptable, the CO will direct the SWA to place the job order into intrastate and interstate clearance and otherwise process the Application in accordance with the procedures contained in § 655.134(c). If the CO determines the job order is not acceptable, the CO will issue a Notice of Deficiency to the employer under § 655.143 of this subpart directing the employer to modify the job order pursuant to paragraph (e) of this section. The Notice of Deficiency will offer the employer the right to appeal.

(c) *Intrastate clearance.* Upon its clearance of the job order, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers. Where the employer's job order references an area of intended employment which falls within the jurisdiction of more than one SWA, the originating SWA will also forward a copy of the approved job order to the other SWAs serving the area of intended employment.

(d) *Duration of job order posting.* The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an *Application for Temporary Employment Certification* is made) for the job opportunity.

(e) *Modifications to the job order.* (1) Prior to the issuance of the final determination, the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. Such modifications must be made or certification will be denied pursuant to § 655.164 of this subpart.

(2) The employer may request a modification of the job order, Form ETA-790, prior to the submission of an *Application for Temporary Employment Certification*. However, the employer may not reject referrals against the job order based upon a failure on the part

of the applicant to meet the amended criteria, if such referral was made prior to the amendment of the job order. The employer may not amend the job order on or after the date of filing an *Application for Temporary Employment Certification*.

(3) The employer must provide all workers recruited in connection with the *Application for Temporary Employment Certification* with a copy of the modified job order or work contract which reflects the amended terms and conditions, on the first day of employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first.

**§ 655.122 Contents of job offers.**

(a) *Prohibition against preferential treatment of aliens.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Job qualifications and requirements.* Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) *Minimum benefits, wages, and working conditions.* Every job order accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) *Housing.* (1) Obligation to provide housing. The employer must provide housing at no cost to the H-2A workers and those workers in corresponding

employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations.* Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.

(2) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock must meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock must meet guidelines issued by OFLC.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer